
YAP J.H.**a****v.****TAN SRI LOH BOON SIEW & ORS**

HIGH COURT MALAYA, PULAU PINANG

MOHAMED DZAIDDIN J

[SUIT NO. 22-47-1990]

b

1 AUGUST 1991

CIVIL PROCEDURE: *Striking out statement of claim - Whether statement of claim frivolous, vexatious or an abuse of the process of Court - Rules of the High Court 1980, O. 18 r. 19(1).*

TORT: *Essentials of conspiracy - False imprisonment - Detained for questioning under s. 117 Criminal Procedure Code.*

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The plaintiff claimed damages for conspiracy, wrongful arrest, false imprisonment and trespass to the person against the defendants. The plaintiff was arrested on 25 February 1987 and then detained at the Penang Central Police Station for 14 days under s. 117 of the Criminal Procedure Code. The arrest and detention arose out of the death of LKK, the son of first defendant. The defendants applied, under O. 18 r. 19(1) of the Rules of the High Court 1980, to strike out the writ and the statement of claim on the grounds that the statement of claim is frivolous, vexatious and an abuse of the process of the Court.

d**Held:**

[1] The plaintiff's action can properly be founded only on the tort of conspiracy and false imprisonment since wrongful arrest comes with false imprisonment and false imprisonment is one of the kinds of trespass to the person. Therefore the Court need only address itself to the questions of conspiracy and false imprisonment.

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[2] To make out a case of conspiracy, the plaintiff must establish (a) an agreement between two persons, (b) an agreement for the purpose of injuring the plaintiff, and (c) that acts done in execution of that agreement resulted in damage to the plaintiff. Damage is an essential element and where damage is not pleaded, the statement of claim may be struck out. Finally, the acts done which resulted in the damage must be without lawful justification or excuse. In the instant case, the plaintiff's statement of claim contains the necessary and essential elements of the tort of conspiracy, the onus remaining on the plaintiff to prove it.

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[3] It is trite law that the powers to strike out a writ of summons and the statement of claim as being frivolous or vexatious or an abuse of the process of the Court under O. 18 r. 19 ought to be sparingly exercised and only in plain and obvious cases, that is, when it is so obvious that the claim is devoid of all merit or cannot possibly succeed. In the instant case, the plaintiff has shown an arguable case and that being so, the application to strike out the plaintiff's action founded on conspiracy is refused.

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[4] With regard to false imprisonment, the gist of the action is the mere imprisonment. The plaintiff need not prove that his imprisonment was unlawful or malicious. He establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant to prove justification. In the instant case, the Court is satisfied that the arrest and detention of the plaintiff on 25 February 1987 was in accordance with the law, as he was detained for questioning under s. 117 of the Criminal Procedure Code. Such being the case the plaintiff's action for false imprisonment against the defendants is obviously unsustainable. In the exercise of the Court's discretion, the defendant's application to strike out the plaintiff's claim for false imprisonment is therefore allowed.

h**i**

- a* [Sixth and Seventh defendant's application to strike out plaintiff's action founded on conspiracy refused with costs. Application of sixth to tenth defendants to strike out the plaintiff's claim for false imprisonment allowed with costs.]

Cases referred to:

- Crofter Harris Tweed Co. Ltd. v. Veitch* [1942] 1 All ER 142 (*cit*)
Lonrho Ltd. v. Shell Petroleum Co. Ltd. [1981] 2 All ER 456 (*cit*)
b *Nagle v. Faielden* [1966] 2 QB 663 (*cit*)
Ward v. Lewis [1955] 1 All ER 55 (*cit*)

Legislation referred to:

- Rules of the High Court 1980, O. 18 r. 19(1)
 Criminal Procedure Code, ss. 23 & 117
 Police Act 1967 ss, 19, 20

- c* **Other sources referred to:**

Clarke & Linsell on Tort, 15 Edn., Cap.14
Halsbury's Laws of England, 4th Edn., Vol. 45, para. 1527
For the plaintiff - Shakuntala Sharma; M/s. Sharma & Jaafar
For the 6th to 10th defendants - Susila S. Param, SFC

d

JUDGMENT

Mohamed Dzaiddin J:

- e* These two applications are made on behalf of the 6th, 7th, 8th, 9th and 10th defendants in this suit to strike out the plaintiff's writ and statement of claim under O. 18 r. 19(1) Rules of the High Court 1980 on the grounds that the statement of claim is frivolous or vexatious or it is otherwise an abuse of the process of the Court. The applications are supported by the affidavits of ASP Shahri bin Abu Mansor of Ibu Pejabat Polis Daerah Georgetown, affirmed on 18 February 1991 and 18 April 1991 respectively (lampiran 32(a) and 33).

- f* By his statement of claim filed on 9 February 1990, the plaintiff claimed against the 1st to the 10th defendants damages for conspiracy, wrongful arrest, false imprisonment and trespass to person. The action was commenced arising out of the untimely death of Loh Kah Kheng, the son of a well-known philanthropist and entrepreneur, Tan Sri Loh Boon Siew, the 1st defendant. As a result of Kah Kheng's death, the cause of death being classified by the coroner as "murder by person or persons unknown", the plaintiff was arrested on 25 February 1987 and detained at Central Police Station, George Town for 14 days under s. 117 Criminal Procedure Code. He was subsequently released and no charge had been preferred against him. Insofar as the 6th to 9th defendants are concerned, the plaintiff alleged that they being the servants or agents of the 10th defendant conspired with the 1st to the 5th defendant and wrongfully arrested and imprisoned him and by reason thereof he suffered loss and damages.

- h* It is pertinent to comment here that the statement of claim was drafted on the following heads of claim: (1) conspiracy; (2) wrongful arrest; (3) false imprisonment; (4) trespass to person. However, in law, the plaintiff's action can only be founded on the tort of conspiracy and false imprisonment. Wrongful arrest comes within the tort of false imprisonment and false imprisonment is one of the kinds of trespass to person, aside from battery and assault (*Clarke & Linsell on Tort*, 15 Edn., Cap. 14). Therefore, for the purpose of these applications

i I shall address myself on conspiracy and false imprisonment.

The Law:

What is the tort of conspiracy? In *Lonrho Ltd. v. Shell Petroleum Co. Ltd.* [1981] 2 All ER 456 the House of Lords in an appeal which arose out of a consultative case stated by the arbitrators under the English Arbitration Act 1950 was asked to consider, *inter alia*, conspiracy as a civil tort. Lord Diplock delivering the only speech stated at p. 463:

My Lords, conspiracy in a criminal offence has a long history. It consists of 'the agreement of two or more persons to effect an unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is completed if there is such agreement, even though nothing is done in pursuance of it.' I cite from Viscount Simon LC's now classic speech in *Crofter Harris Woven Harris Tweed Co. Ltd. v. Veitch* [1942] 1 All ER 142 at p. 146, [1942] AC 435 at 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted, the agreement, which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

In order to make out a case of conspiracy, the plaintiff must establish (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in damage to the plaintiff (*Halsbury's Laws of England*, 4 Edn., Vol. 45, para. 1527). Damage is an essential element and where damage is not pleaded, the statement of claim may be struck out - *Ward v. Lewis* [1955] 1 All ER 55 at p. 56, 57. Finally, the acts done which resulted in damage must be without lawful justification or excuse. (*Crofter Harris Tweed Co. Ltd. v. Veitch* [1942] 1 All ER 142.)

In the light of the law stated above, it is convenient for me to consider first the material paragraphs in the statement of claim alleging conspiracy. They are stated thus:

12. On or about 25 February 1987 the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants wrongfully and maliciously conspired and combined amongst themselves to have the plaintiff arrested on suspicion of having murdered the said Loh Kah Kheng, deceased.
13. In pursuance and in furtherance of the said conspiracy, the aforesaid defendants did the following overt acts, namely:
 - (a) tampered with the conditions and circumstances in which the corpse of the said Loh Kah Kheng, deceased was in *in situ*.

Particulars

- (i) rearranging and/or tampering with the wires which were tied to the neck, hands and body of the said Loh Kah Kheng, deceased;
 - (ii) rearranging the position of the body of the said deceased;
 - (iii) rearranging and/or substituting the apparel of the said deceased;
- (b) lodging a police report in the name of the 2nd defendant which led to the arrest of the plaintiff;
- (c) failing to immediately inform the police of the discovery of the corpse of the said deceased;
- (d) failing to carry out the measures or procedures of investigation required by the circumstances;
- (e) arresting the plaintiff and detaining him for 2 weeks in a police lock-up;
- (f) offering a RM500,000 reward for information leading to the arrest and conviction of the murderer of the said deceased.

- a** 14. Each of the acts specified in the preceding paragraphs hereof was done by the person or persons therein alleged on behalf of himself or themselves and his or her or their co-conspirators in furtherance of the said conspiracy.
15. By reason of the matter aforesaid, the plaintiff was wrongfully arrested and imprisoned, and has been greatly injured in his credit and reputation, and has been put to considerable pain, trouble, inconvenience and expense and has suffered loss and damage.
- b** It would appear to me that para. 12 alleges the agreement between the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants to conspire for the purpose of getting the plaintiff arrested on suspicion of murder. Paragraph 13 sets out by way of particulars the overt acts which are alleged to have been done by these defendants in pursuance and in furtherance of the alleged conspiracy. In fact, this paragraph alleges a concerted action taken by the defendants.
- c** Paragraph 14 repeats para. 13. Finally, para. 15 pleads the essential ingredient that the alleged acts resulted in loss and damage to the plaintiff. Based on these paragraphs, in my opinion, the plaintiff's statement of claim contain the necessary and essential elements of the tort of conspiracy and the onus remains on the plaintiff to prove conspiracy and damage arising thereof.
- d** Puan Susila Param, the Federal Counsel relied on the affidavits of ASP Shahri to show that there was just cause or excuse for the 6th and 7th defendants to take action against the plaintiff. Puan Param, submitted that in the circumstances of the case, the defendants as police officers had acted within the powers given to them under ss. 19 and 20 of the Police Act 1967 and ss. 23 and 117 of the Criminal Procedure Code. Now, can this "defence" of just cause or excuse of the 6th and 7th defendants make the plaintiff's claim for conspiracy so "obviously frivolous or vexatious, or obviously unsustainable" or that the pleading becomes "so clearly frivolous that to put it forward would be an abuse of the process of the Court". My answer is simply this. It is trite law that the powers to strike out a writ of summons and the statement of claim as being frivolous or vexatious or an abuse of the process of the Court under O. 18 r. 19 ought to be sparingly exercised and it is only in plain and obvious cases that recourse should be had, that is, when it is so obvious that the claim is devoid of all merit or cannot possibly succeed. In *Nagle v. Faielden* [1966] 2 QB 663, Salmond LJ stated at p. 651:
- f** It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.
- Secondly, I feel it inappropriate at this stage for me to come to a conclusion that the plaintiff's claim on conspiracy is devoid of any merit. Suffice it to say that the plaintiff has shown an arguable case. Since the onus lies on the plaintiff of proving that the 6th and 7th defendants have conspired with the 1st to the 5th defendants to have the plaintiff arrested thereby committed the tort of conspiracy, for which he had suffered loss and damage, I should in the circumstances of the case postpone my consideration of the "defence" of justification until the full trial. In the result, the 6th and 7th defendants' application to strike out the plaintiff's action founded on conspiracy is hereby refused with costs.
- g**
- h** Next, I shall deal with the plaintiff's claim for damages for false imprisonment.
- The Law:*
- An action of false imprisonment lies at the suit of a person who causes the imprisonment. The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that his imprisonment was unlawful or malicious, but establishes a *prima facie* case if
- i** he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving justification. (See *Halsbury's Laws of England, supra*, para. 1325.)

The relevant paragraphs in the statement of claim are as follows:

16. On or about 25 February 1987, the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants wrongfully directed and procured the police to arrest the plaintiff and take him into custody or a charge, then made by the said defendants, that the plaintiff had murdered the said Loh Kah Kheng, deceased.
17. Acting upon the said direction, the police thereupon arrested the plaintiff and took him in custody to Georgetown Central Police Station, where the plaintiff was detained for 14 days whereafter the plaintiff was released and discharged from custody.
18. In the premises, the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants caused the plaintiff to be wrongfully imprisoned and deprived of his liberty for a period of 14 days.
19. By reason of the matters aforesaid, the plaintiff sustained severe shock and mental anguish and has suffered loss and damage.
20. Further, the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants acted as aforesaid out of spite and malice towards the plaintiff, and they caused the plaintiff to be arrested in broad daylight in front of a crowd and with the wide publication in the media and thereby subjected him to humiliation and disgrace and brought him into ridicule and contempt.
21. On 25 February 1987, at about 5.30 p.m., a policeman wrongfully and without reasonable cause arrested the plaintiff and took him in custody to the Georgetown Central Police Station, where the plaintiff was detained and interrogated for 14 days until he was released therefrom.
22. The said police was at all material times, under the direction and control of the 8th and 9th defendants in the performance or purported performance of his functions.
23. In the premises, the plaintiff was wrongfully imprisoned and deprived of his liberty, and the 6th, 7th, 8th, 9th and 10th defendants is liable to the plaintiff in respect of such imprisonment.

From the above-mentioned paragraphs of the statement of claim, the gist of the plaintiff's complaint of false imprisonment is that on 25 February 1987 the 1st to the 7th defendants directed the police to arrest him and to be taken into custody at George Town Central Police Station and detained and interrogated for 14 days until he was released without further charge. The plaintiff further alleged that the said police officers who arrested him in broad daylight and given wide publicity in the media were under the direction of the 8th and 9th defendants.

It is important to remember that the plaintiff need not allege in the statement of claim that the arrest and imprisonment was unlawful, as the burden of proof is on the defendants to show that it was lawful. (*Halsbury's Law, supra*). Therefore, in this case as the onus is on the defendants to prove justification, the affidavits of ASP Shahri become material in explaining the facts and circumstances leading to the arrest and detention of the plaintiff and to show that such arrest and detention was lawful. After perusing ASP Shahri's affidavits, I am satisfied with his explanation that the arrest and detention in custody of the plaintiff on 25 February 1987 was in accordance with the law. In short, the plaintiff was detained for questioning under s. 117 of the Criminal Procedure Code. Such being the case here, the plaintiff's action for false imprisonment against these defendants has now become "obviously unsustainable" and I am convinced that the plaintiff's claim cannot succeed. Therefore, in the exercise of my discretion, I allow the application of the 6th, 7th, 8th, 9th and 10th defendants in striking out the plaintiff's claim for false imprisonment against them as per paras. 16 to 24 of the statement of claim. I give costs to these defendants.

Also found at [1991] 3 CLJ 2960